STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

HAROLD RALPH MCDONALD,

Defendant-Appellee.

UNPUBLISHED
March 25, 2021

No. 352868
Oakland Circuit Court
LC No. 2019-177462-AR

Before: O'BRIEN, P.J., and SERVITTO and GLEICHER, JJ.

PER CURIAM.

The prosecution appeals, on leave granted (*People v McDonald (McDonald I)*, unpublished order of the Court of Appeals, entered May 20, 2020 (Docket No. 352868), the circuit court order affirming the dismissal of an operating a motor vehicle while intoxicated (OWI) MCL 257.625(1) charge against defendant. We reverse and remand for proceedings consistent with this opinion.

On March 6, 2019, Michigan State Police Trooper Michael McCuaig was dispatched to East I-696 near Greenfield in Southfield, MI with respect to a car having crashed into the median wall. When Trooper McCuaig arrived at the scene, he saw a silver Mazda parked against the median on the left shoulder of the road. It was snowing/sleeting and the roads were icy. Dash cam footage recorded what followed.

McCuaig approached the silver Mazda. Already standing outside of the car, defendant identified himself to McCuaig as the car's driver and explained that he had lost control of his car and slid into the median wall. McCuaig noticed that defendant had bloodshot, watery eyes and could smell alcohol on defendant's breath. Defendant admitted that he had drunk two "tallboys"[1] earlier in the evening. McCuaig observed that defendant was not slurring his words, did not appear confused, and was answering his questions appropriately.

[1] A can of beer or other alcoholic beverage that is at least 16 ounces.

McCuaig thereafter administered five field sobriety tests to defendant. McCuaig admitted that he failed to administer one of the tests properly and that defendant would have "passed" three of the other tests by National Highway Traffic Safety Administration (NHTSA) standards, although there were indications during the tests that defendant was intoxicated. With respect to the fifth test, a preliminary breath test (PBT), McCuaig administered the test 6 minutes and 35 seconds after defendant had ceased smoking a cigarette, which is contrary to Michigan Admin Code R 325.2655(2)'s requirement that an operator of a PBT wait at least 15 minutes after the subject has last "smoked" before administering the PBT.[2] On defendant's first blow into the PBT device, the device returned an error. According to McCuaig, defendant was blowing into the device incorrectly. On defendant's second blow, the machine calculated defendant's blood-alcohol content to be ".122"—over the legal limit. McCuaig then arrested defendant.

Defendant pleaded guilty to operating a motor vehicle while intoxicated (OWI), MCL 257.625(1). On defendant's motion, the district court permitted defendant to withdraw his guilty plea. Defendant thereafter moved the district court to suppress all evidence seized after his OWI arrest based on lack of probable cause. The district court determined that the PBT could not be used in the probable cause determination because McCuaig violated Rule 325.2655(2) in administering the test, nor could the horizontal-gaze nystagmus test (HGN) that McCuaig admitted he had also administered improperly. The district court considered the remaining tests and evidence and concluded that without the PBT and HGN evidence, not enough remained for McCuaig to have probable cause to believe that defendant operated a motor vehicle while intoxicated. Accordingly, the district court granted defendant's motion to suppress and dismissed the case.

The prosecution appealed, and the circuit court affirmed the district court's ruling. This Court granted defendant's motion for leave to appeal.

This Court reviews de novo a lower court's "ultimate determination on a motion to suppress." *People v Mullen*, 282 Mich App 14, 21; 762 NW2d 170 (2008), citing *People v McBride (On Remand)*, 273 Mich App 238, 249; 729 NW2d 551 (2006), rev'd in part on other grounds 480 Mich 1047 (2008). But as for the lower court's factual findings, this Court reviews those for clear error. *Id.*, citing *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005). Thus, a lower court's findings of fact will be affirmed unless this Court is "left with a definite and

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[2] Michigan Admin Code R 325.2655(2) states in relevant part:

> A procedure that is used in conjunction with preliminary breath alcohol analysis must be approved by the department and shall be in compliance with all of the following provisions:
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> * * *
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> (b) A person may be administered a preliminary breath alcohol analysis on a preliminary breath alcohol test instrument only after the operator determines that the person has not smoked, regurgitated, or placed anything in his or her mouth for at least 15 minutes.

firm conviction that a mistake was made." *People v Mazzie*, 326 Mich App 279, 288-289; 926 NW2d 359 (2018), quoting *People v Simmons*, 316 Mich App 322, 325; 894 NW2d 86 (2016). This Court reviews de novo underlying issues of law such as statutory questions or the application of a constitutional standard to uncontested facts. *Id*. at 289 (citation omitted).

The prosecution first argues that the district court erred by disregarding the HGN test result and PBT sample. The prosecution reasons that, even if Trooper McCuaig improperly administered these field sobriety tests, the district court still should have considered them when reviewing the totality of the circumstances before McCuaig at the time of defendant's arrest. The prosecution further contends that even if the trial court properly disregarded those two tests, sufficient facts and circumstances known to the arresting officer otherwise constituted probable cause to arrest defendant. We agree.

At the outset, we note that none of the district court's factual findings here are clearly erroneous. Therefore, we do not dispute the district court's finding that McCuaig failed to comply with Rule 325.2655(2) when administering the PBT, the district court's finding that McCuaig failed to comply with NHTSA rules when administering the HGN, nor the district court's finding that the one-leg-stand test and the walk-and-turn test did not indicate defendant was intoxicated over the limit. The only issue here is the conclusion that the district court drew from these findings.

"The Fourth Amendment of the United States Constitution—like Article 1, § 11 of the 1963 Michigan Constitution, whose protections have been construed as coextensive with its federal counterpart, protects against unreasonable searches and seizures." *People v Mead*, 503 Mich 205, 212; 931 NW2d 557 (2019) (citations omitted); US Const, Am IV; Const 1963, art 1, § 11. A seizure is reasonable so long as it is justified by probable cause. *Dunaway v New York*, 442 US 200, 208; 99 S Ct 2248; 60 L Ed 2d 824 (1979). Accordingly, a police officer may seize, i.e., arrest, a person if he or she has probable cause to believe that an offense has occurred and that the subject of his or her arrest committed that offense. *People v Cohen*, 294 Mich App 70, 74; 816 NW2d 474 (2011).

An officer has probable cause to arrest a suspect when the circumstances known to the officer at the time of the arrest would warrant a reasonably prudent person to believe that the suspect has committed the offense. See *id*. at 75, citing *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996) ("Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."). In effect, using his or her common sense, a police officer need only conclude that a reasonable person would believe that there is a "substantial chance" that the target of his or her arrest has committed the alleged criminal activity. *Mullen*, 282 Mich App at 27, citing *Champion*, 452 Mich at 115. In reviewing an officer's probable cause determination, a court must consider the totality of the circumstances that were before the officer; in other words, a court must consider "the whole picture." See *Dist of Columbia v Wesby*, ___ US ___;138 S Ct 577, 588; 199 L Ed 2d 453 (2018), quoting *United States v Cortez*, 449 US 411, 417; 101 S Ct 690; 66 L Ed 2d 621 (1981).

McCuaig's failure to properly administer the PBT and the HGN likely affected the accuracy of those tests. After all, the purpose of Rule 325.2655(2) is to ensure the accuracy of a

PBT. *People v Tipolt*, 198 Mich App 44, 46; 497 NW2d 198 (1993). Hence, the accuracy of a PBT administered in violation of that rule is questionable. And as for HGNs, given that this Court has held that an improperly conducted HGN is inadmissible at trial, it reasonably follows that an improperly conducted HGN may not be reliable. See *People v Berger*, 217 Mich App 213; 217-218; 551 NW2d 421 (1996) (holding that evidence of HGN test is inadmissible at a criminal trial unless prosecution shows that the test was properly performed).

Nevertheless, this Court has held that even a PBT administered contrary to Rule 325.2655(2) may still have probative value concerning an officer's probable cause determination under the totality of the circumstances. See *Mullen*, 282 Mich App at 27-28. In *Mullen*, several minutes before a police officer administered a PBT, a suspect had paper in his mouth. *Id*. at 23. Even though this violated Rule 325.2655(2), the Court held that the PBT sample was not rendered "significantly unreliable as to preclude reasonable belief by a police officer or a magistrate that defendant's blood might contain evidence of intoxication." *Id*. at 27-28.

Here, defendant here had smoke in his mouth less than 15 minutes prior to taking the PBT. But there is nothing in the record before us to indicate that smoke renders a PBT sample higher.[3] Thus, while defendant has indeed cast doubt on the accuracy of the PBT, he has not shown that it was unreliable to such a degree that no reasonable person could even consider it as evidence that defendant was intoxicated over the legal limit. The PBT sample—although with diminished weight—was still a relevant factor in the totality of the circumstances. See *Illinois v Gates*, 103 S Ct 213, 232; 462 US 213; 76 L Ed 2d 527 (1983) (noting that, in dealing with probable cause, one deals with probabilities—not certainties).

With respect to the HGN test, there is nothing in the record before us to indicate that McCuaig's performing only one pass with his finger instead of the required two passes rendered the results of that test meaningless. Although McCuaig failed to comply with NHTSA standards in performing the test, he testified that he still observed nystagmus in defendant's eyes, indicating to him that defendant was intoxicated. While the fact that McCuaig improperly administered the HGN casts doubt on the accuracy of his observation, it does not deprive his observation of all probative value. Indeed, this Court has noted that a police officer's experience is relevant to the establishment of probable cause. *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001).

In sum, the district court should have considered the PBT sample and the HGN result as part of the totality of the circumstances. The court incorrectly concluded that the PBT sample and HGN test were so unreliable as to preclude reasonable belief by a police officer that defendant's blood might contain evidence of intoxication above the legal limit. While the district court would have been justified in assigning this evidence less weight when reviewing the totality of the circumstances, the court was not justified in completely disregarding it.

Under the totality of the circumstances, McCuaig had probable cause to arrest defendant. Despite the diminished value of the PGT and HGN evidence, there were other circumstances here to compensate for any diminished value. Cf. *Gates*, 462 US at 244 (holding that independent

[3] An excerpt of the NHTSA training manual states that residual mouth alcohol or cigarette smoke can cause a PBT sample to "be higher than the true BAC."

police corroboration of informant's assertions may compensate for that informant's lack of reliability or credibility).

In *Mullen*, 282 Mich App at 17-18, 27-28, this Court determined that, under the following circumstances, there was enough evidence to establish probable cause: (1) defendant smelled like alcohol; (2) defendant had watery or glassy eyes; (3) defendant drove through a red light at 2:00 a.m.; (4) defendant admitted that he had drunk two glasses of wine before driving; (5) defendant's eyes exhibited nystagmus during an HGN; (6) during a "finger to nose" test defendant "swayed" and his speech was slightly slurred; and (7) defendant had paper in his mouth with 15 minutes of taking a PBT. The facts here are remarkably similar. The only differences are that here defendant crashed his car into the median rather than running a red light, defendant had cigarette in his mouth rather than paper, and defendant did not sway or have slurred speech.

We do not believe these differences warrant a different result. Although there may have indeed been an innocent explanation for defendant's car accident, the existence of a possible innocent explanation does not negate a finding of probable cause. *See Wesby*, 138 S Ct at 588 (noting that probable cause analysis does not require a magistrate to rule out every innocent explanation for suspicious facts). Although defendant had smoke in his mouth less than 15 minutes prior to the PBT and did not sway or have slurred speech, these circumstances are not compelling enough to conclude that in their absence no reasonable person could believe defendant drove a motor vehicle while intoxicated.

Because the district court disregarded the results of the PBT and HGN and concluded that Trooper McCuaig lacked probable cause to arrest defendant, the district erred. By affirming the district court, the circuit court erred. Accordingly, we reverse the circuit's order and the district court's order and remand for further proceedings.

Reversed and remanded to the district court for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Colleen A. O'Brien
/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher